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Supreme Court, U.S.
FILED

No. 97 1258 JAN 20 1998

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID SIMEON and PETER ZEGLER,
Petitioners,

v.

JAMES E. HARDIN, JR., District Attorney
for the Fourteenth Judicial District,
Respondent.

On Petition for Writ of Certiorari
to the North Carolina Court of Appeals

SUPPLEMENTAL APPENDIX

19pp

No. 386P97 Fourteenth District

Supreme Court of North Carolina

DAVID SIMEON, PETER ZEGLER, and others similarly situated

v.

JAMES E. HARDIN, JR., District Attorney for the Fourteenth Judicial District

From NC Court of Appeals (COA96-873)

From Durham (92CVS4318)

Order

Upon consideration of the petition filed by Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 2nd day of October 1997.

S/ Orr, J.
For the Court"

Witness my hand and the seal of the Supreme Court of North Carolina, this the 6th day of October 1997.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina
Carol K. Barnhill, Assistant Clerk

No. COA96-873
North Carolina Court of Appeals
Filed : 15 July 1997

DAVID SIMEON, PETER ZEGLER,
and others similarly situated,

Plaintiff-Appellants

v. Durham County
No. 92 CVS 4318

JAMES E. HARDIN, JR., District Attorney
for the Fourteenth Judicial District,

Defendant-Appellee

Appeal by plaintiffs from order entered 26 April 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 1 April 1997.

Marvin Sparrow; and N.C. Prisoner Legal Services, Inc., by Marcus Jimison, for plaintiff-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Debra C. Graves and Special Deputy Attorney General David Roy Blackwell, for defendant-appellee.

MARTIN, Mark D., Judge

Plaintiffs David Simeon (Simeon) and Peter Zegler (Zegler) (collectively plaintiffs) appeal from order of the trial court concluding plaintiffs were not entitled to attorney's fees

pursuant to 42 U.S.C. § 1988.

On 2 October 1992 Simeon, on behalf of himself and others similarly situated, instituted the present action alleging N.C. Gen. Stat. §§ 7A-49.3, 7A-61, and 15A-931, which establish the district attorney's calendaring powers, were unconstitutional on their face and as applied. On 15 October 1992 the complaint was amended as of right to add Zegler "as a named representative of the plaintiff class." On 30 November 1992 District Attorney Ronald Stephens, the original named defendant, made a motion to dismiss plaintiffs' action for failure to state a claim.

Judge Robert L. Farmer, by order entered 11 March 1993, granted defendant's motion to dismiss. Plaintiffs appealed. By opinion filed 30 December 1994, the Supreme Court found the challenged statutes constitutional on their face, but remanded for further proceedings to determine "whether the statutes authorizing district attorney calendaring are being applied in an unconstitutional manner by the District

Attorney of the Fourteenth Judicial District (Durham County)." *Simeon v. Hardin*, 339 N.C. 358, 379, 451 S.E.2d 858, 872 (1994) (hereinafter *Simeon I*).

On 5 June 1995, after remand, newly elected District Attorney James Hardin (defendant) established a new case management system. In consideration for implementing this new system, plaintiffs agreed to dismiss the instant action with prejudice. On 19 June 1995 plaintiffs filed their notice of voluntary dismissal with prejudice. On 23 June 1995 plaintiffs made a motion for costs and expenses, including attorney's fees in the amount of $181,472.60, pursuant to 42 U.S.C. § 1988(b). By reply filed 9 November 1995, plaintiffs clarified their motion for attorney's fees in no way relies on the catalyst theory, but rather is solely predicated "on the bargained for settlement agreement." The trial court, by order dated 26 April 1996, denied plaintiffs' motion for attorney's fees.

On appeal plaintiffs contend, among other things, the trial court erred by (I) concluding plaintiffs were not prevailing

parties; and (II) denying attorney's fees on the ground plaintiffs' counsel failed to differentiate between claims on time records.

At the outset, we note, although plaintiffs filed a motion for class certification, they failed to obtain a ruling upon the motion. Consequently, this issue is not properly preserved for appeal. N.C. R. App. P.10(b)(1). Plaintiffs also admit they in no way relied on the so-called "catalyst" theory to support their section 1988 claim. Thus, as this Court "will not decide questions that have not been presented to the courts below ...," *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983), we need not consider the viability of the "catalyst" theory in this jurisdiction nor its applicability under the present facts and circumstances.

The dispositive issue in the instant case is whether, within the meaning of section 1988, plaintiffs are prevailing parties entitled to recoup the attorney's fees they incurred

prosecuting their claim for a violation of section 1983.

Section 1988 provide, "[i]n any action or proceeding to enforce a provision of [section 1983] ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." 42 U.S.C. § 1988 (b) (1994). Thus, to qualify for attorney's fees under section 1988, plaintiffs must be "prevailing parties." *Farrar v. Hobby*, 506 U.S. 103, 109, 121 L.Ed.2d 494, 502 (1992).

"A typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" *Texas Teachers v. Garland School Dist.*, 489 U.S. 782, 789, 103 L.Ed.2d 866, 875 (1989) (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L.Ed.2d 40, 50 (1983)) (citation omitted) (emphasis added). The "touchstone" of this formulation is the benefit achieved must result in a "material

alteration of the legal relationship of the parties ... ." *Id.* at 792-793, 103 L.Ed.2d at 878. "Beyond this absolute limitation, a technical victory may be so insignificant ... as to be insufficient to support prevailing party status." *Id.* at 792, 103 L.Ed.2d at 877. Simply put, even under the "generous formulation" adopted by the United States Supreme Court, *Farrar*, 506 U.S. at 109, 121 L.Ed.2d at 502, a purely technical or de minimis success on a legal claim does not vest plaintiffs with "prevailing party" status, *Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 877.

A.

We first consider whether Zegler is a "prevailing party" within the meaning of section 1988.

Our Supreme Court, in *Simeon I*, noted all the criminal charges against Zegler were dismissed thereby rendering his claims moot. *Simeon I*, 339 N.C. at 370, 451 S.E.2d at 867. In fact, the *Simeon I* court expressly stated Zegler could

remain a named plaintiff only if the action was certified as a class action. *Id.* At 371, 451 S.E.2d at 867. Plaintiffs failed to obtain class certification. Therefore, as Zegler was not a proper party to the present action, *id.*, he cannot be a "prevailing party."

B.

Although Simeon remains a viable plaintiff, *Simeon I*, 339 N.C. at 370, 451 S.E.2d at 867, we likewise conclude he is not a "prevailing party" because the new case management system does not materially alter the relationship between the parties. *See Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 878.

A consent decree, settlement, or other voluntary action by a defendant may justify the award of attorney's fees under section 1988. *See Maher v. Gagne*, 448 U.S. 122, 129, 65 L.Ed.2d 653, 661 (1980). The absence of a formal judgment, however, does not eviscerate the necessity for the settlement to directly benefit plaintiff by altering its relationship with

defendant. *See Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 877 (threshold requirement is some benefit to plaintiff).

In a strikingly similar factual setting the United States Supreme Court refused to award attorney's fees to plaintiff Aaron Helms because, among other things, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt v.Helms*, 482 U.S. 755, 762, 96 L.Ed.2d 654, 662 (1987). In *Hewitt*, Helms was placed on administrative segregation for his possible involvement in a riot at the Pennsylvania State Correctional Institution. *Id.* at 757, 96 L.Ed.2d at 659. Over seven weeks later a prison hearing committee sentenced Helms to six months of disciplinary restrictive confinement. Id. While incarcerated, Helms filed a claim, pursuant to 42 U.S.C. § 1983, alleging the "lack of a prompt hearing ... [and use of] uncorroborated hearsay testimony violated his right to due process." *Id.* Prior to any decision, Helms was paroled. *Id.* The Pennsylvania Bureau of

Corrections subsequently amended its hearing procedures to address the use of confidential source information. *Id.* At 759, 96 L.Ed.2d at 660. Helms subsequently sought attorney's fees under section 1988. *Id.*

In declining to award Helms attorney's fees, the united States Supreme Court emphasized that Helms' release from prison prevented him from enjoying any benefit from the new prison hearing procedures and, thus, he could not be considered a "prevailing party." Id. At 763-764, 96 L.Ed.2d at 663. Likewise, in the present case, Simeon pled guilty to two counts of felonious assault prior to any decision in the instant action. On one count Simeon was sentenced to time served, and on the other he received a prayer for judgment continued (PJC). Although the Simeon I Court found Simeon's PJC status sufficient to convey standing, Simeon I, 339 N.C. at 370, 451 S.E.2d at 866-867, mere standing to sue does not necessarily establish the new case management system benefitted Simeon and materially altered the parties'

relationship. In addition, the mere possibility of re-incarceration is not sufficient to establish Simeon benefitted from Hardin implementing the new case management system. *See Hewitt*, 482 U.S. at 764, 96 L.Ed.2d at 663 (actual return to prison after parole not sufficient to retroactively render Helms a "prevailing party"). Therefore, Simeon is not a "prevailing party."

It naturally follows – as plaintiffs cannot satisfy the threshold requirement for the award of attorney's fees pursuant to section 1988, see Farrar, 506 U.S. at 109, 121 L.Ed.2d at 502 (only "prevailing party" qualifies for fees under section 1988) – we need not consider their remaining assignments of error.

Accordingly, the trial court did not err by denying plaintiffs' motion for attorney's fees under section 1988.

Affirmed.

Judges EAGLES and WALKER concur.

Report per Rule 30 (e).

State of North Carolina
Count of Durham

General Court of Justice
Superior Court Division
No. 92-CV-4318

DAVID SIMEON, PETER ZEGLER, and other similarly situated,
Plaintiffs,

v.

ORDER

JAMES E. HARDIN, JR., District Attorney for the Fourteenth Judicial District,
Defendant.

This matter came on for hearing before the undersigned Senior Resident Superior Court Judge upon motion of the plaintiffs for attorney's fees at the 15 April 1996 regularly scheduled term of Durham County Superior Court. After having reviewed the record in this case, the motion and affidavits filed by the plaintiffs, the briefs of both the plaintiffs and the defendant, and the arguments of the parties, this Court makes the following:

FINDINGS OF FACT

1. Plaintiff David Simeon filed this action against then District

Attorney Ronald Stephens in his official capacity on 2 October 1992 alleging the unconstitutionality on their face and as applied, of the district attorney's legislatively mandated calendaring powers as set forth in N.C. Gen. Stat. §§ 7A-49.3, 7A-61 and 15A-931.

2. On 15 October 1992 the plaintiffs amended the complaint as a matter of right to add Peter Zegler as a "named representative of the plaintiff class."

3. The plaintiffs did not amend the complaint to add additional plaintiffs, nor did the plaintiffs ever obtain the certification of this action as a class action.

4. In their prayer for relief, plaintiffs sought a declaration of unconstitutionality of N.C. Gen. Stat. §§ 7A-49.3, 7A-61 and 15A-931. Additionally, plaintiffs sought to temporarily and permanently enjoin the district attorney from preparing trial dockets in criminal cases and from calling criminal cases for trial. They further sought the transfer of all docketing and calendaring functions to either the Court or an office

independent of the prosecutor and answerable to the court, such as the Trial Court Administrator. Alternatively, the plaintiffs sought a court order restricting the district attorney's docketing powers such that they were exercisable only with the approval of the Court.

5. Following Judge Robert L. Farmer's decision on 11 March 1993 to dismiss plaintiffs' action for failure to state a claim upon which relief may be granted, plaintiffs appealed to the appellate division. In an opinion filed 30 December 1994, the North Carolina Supreme Court found the statutes constitutional on their face and remanded the matter to superior court for trial on the merits concerning the application of the statutes in Durham County.

6. Following remand, on 5 June 1995, newly elected District Attorney Jim Hardin established a case management system in conjunction with the Senior Resident Superior Court Judge and Senior Resident Superior Court Judge Designee.

7. The settlement agreement in this matter provides

"Defendant has established a case management system as attached, and will deliver a letter agreement to the Public Defender regarding meetings as discussed. In consideration therefore, and upon receipt thereof in final executed form, plaintiffs will dismiss this action with prejudice."

8. The case management system instituted by the district attorney retains calendaring authority with the district attorney, and grants the plaintiffs nothing significant sought in the prayer for relief found in the complaint.

9. On 19 June 1995 in consideration of the case management system, plaintiffs dismissed the action with prejudice.

10. As of 19 June 1995, neither plaintiff Simeon nor plaintiff Zegler was a defendant in any criminal proceeding in the District or Superior Courts of the Fourteenth Prosecutorial District.

11. The plaintiffs never litigated their claim the the challenged statutes were unconstitutional, as applied, in the Fourteenth Prosecutorial District.

12. The plaintiffs obtained no temporary or permanent injunction baring the defendant from preparing trial dockets and calling cases for trial in the Fourteenth Prosecutorial District, nor did they obtain any other order or relief of any nature so prohibiting the district attorney or limiting the exercise of his constitutional and statutory powers.

13. On 26 June 1995, plaintiffs filed a motion seeking one hundred eighty-one thousand dollars ($181,000) in attorneys fee pursuant to 42 U.S.C. § 1988. Participating counsel for the plaintiffs filed affidavits filed with the motion setting out times they claimed they expended in this litigation.

14. The affidavits fail to identify, separately, hours expended in pursuit of the separate claims made in the litigation. The affidavits list meetings with clients, without specifying the client. Only Simeon and Zegler ever joined the action as parties plaintiff, and Simeon left the jurisdiction early in the litigation.

15. In their motion, plaintiffs argue that the district attorney

instituted the case management system under pressure of this action.

Based upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The plaintiffs are not prevailing parties entitled to an award of fees. Plaintiffs failed to obtain any of the relief which the complaint sought, and they voluntarily dismissed this action.

2. Alternatively, neither plaintiff Simeon nor plaintiff Zegler was, at the time of the dismissal, a defendant in any pending criminal case in the Fourteenth Prosecutorial District. Thus, no order entered in this matter could have affected the plaintiffs legal relationship with the defendant.

3. Alternatively, the catalyst theory is not available to the plaintiffs to support an award of fees.

4. The affidavits filed by plaintiffs' counsel amount to a blanket fee request without sufficient specificity and detail. Such documentation is not sufficient to support an award of

fees. Therefore, in accordance with the foregoing it is ordered that the Motion for an Award of Attorney Fees filed by the plaintiffs in this action be and hereby is DENIED.

Done this the 26 day of April 1996.

Orlando F. Hudson
Senior Resident Superior
Court Judge